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RELIGIOUS HARASSMENT IN THE WORKPLACE: AN ANALYSIS OF THE EEOC's PROPOSED GUIDELINES

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INTRODUCTION

We are here at this symposium because of the Religious Freedom Restoration Act (RFRA). Underlying RFRA was a Supreme Court decision about (un)employment law. *Employment Division v. Smith*,[1] let us remember at the outset, was a decision about (un)employment. Of course, the Supreme Court's notorious, widely criticized[2] decision in *Smith* was primarily about the

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1. 494 U.S. 872 (1990).

2. For a critical commentary on the *Smith* decision, see Ann E. Beeson, *Dances with Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121, 1125 (1992) (describing the *Smith* decision as "the culmination of judicial misunderstanding of peyotism," and suggesting that the Court misapplied free exercise precedents as established in previous cases and created amorphous and incorrect distinctions between religious beliefs and religious action); Gabrielle G. Davison, *The "Extreme and Hypothetical" Come to Life:* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 43 CATH. U. L. REV. 641, 643 and 647 (1994) (asserting that while the *Smith* test appears to result in a clearer standard for free exercise challenges, "in reality it has greatly decreased the protection that the Free Exercise Clause historically has provided to religious groups." And further arguing that the *Smith* court's focus on neutrality of religious restrictions "fails to effectuate the purpose of the Free Exercise Clause . . . . Consequently, the *Smith* analysis accords less deference to this fundamental right than the most trivial claim under the Equal Protection Clause."); Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 419 (1994) (arguing that "[a]lthough *Smith* has a few scholarly defenders, the general view among the commentators is that the decision is seriously flawed as a matter of textual interpretation, historical analysis, and in its understanding of free exercise precedents."); Mary A. Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 530-32 (1991) (criticizing the Court's more deferential test in free exercise cases as applied in *Smith*:

> A mechanically applied deferential approach could be subversive of individual, associational, and institutional free exercise, especially where small, unconventional, or unpopular religions are concerned . . . . If *Smith* does, as many fear, represent the Court's adoption of a reflexive, mechanical form of deference, the results could be as inimical to religious freedom as they were under the old separationist approaches. "The principal problem with *Smith* . . . is the current majority's readiness to accept unsupported government assertions about the nature and strength of its interests, without reckoning the likely burdens in each case on free exercise.);

First Amendment (un)free exercise of religion. But *Smith* was also an (un)employment law case. It also was the single most

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David L. Gregory & Charles J. Russo, *Let Us Pray (But Not "Them"!): The Troubled Jurisprudence of Religious Liberty*, 65 ST. JOHN'S L. REV. 273 (1991); Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Freedom*, 54 OHIO ST. L.J. 713, 749 (1993) (arguing:

> [d]espite cries in the literature that it dramatically changed free exercise jurisprudence, *Smith* reiterated the Court's entrenched use of the belief/conduct paradigm and its longstanding doctrine against singling out any particular religion. Hence, *Smith* is not radically different from its forerunners; the single change made is a downward adjustment of the level of scrutiny to be applied to regulations of conduct within the belief/conduct paradigm.);

Richard Herz, *Legal Protections for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691 (1993) (arguing that by explicitly rejecting the notion that the state was required to demonstrate a compelling purpose for measures substantially burdening religious practice, *Smith* has essentially excluded the idea of accommodation of communal rights under the Free Exercise Clause); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 20-25 (arguing that "[i]f the Court intends to defer to any formally neutral law restricting religion, then it has created a legal framework for persecution, and persecutions will result," and that the *Smith* decision may also cause greater persecution of groups that cannot defend themselves via the political process); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 609 (1991) (stating:

> In the context of special treatment of religion, positive acts by the political branches will generally produce more detriments to the principle of equal religious liberty than benefits to the principle of religious liberty per se. *Smith* is thus profoundly wrong on both substantive and institutional grounds, and the voluntary accommodations it invites will in the long run do far more harm than good to the ends of the religion clauses);

Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 252 (1994) (arguing that "[a]lthough written by Justice Scalia, the leading proponent on the Court of judicial reliance on the original meaning of the text, the *Smith* opinion simply ignores the circumstances surrounding the adoption of the Free Exercise Clause. Nor does the opinion even faintly attempt to parse the text of the clause."); Kenneth Marin, Employment Division v. Smith*: the Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1433 and 1465-66 (1991) (suggesting that removing the strict scrutiny of free exercise claims will eliminate a "significant safeguard of liberty" and generate legislative indifference towards religious beliefs, and noting that "[r]egardless of the effect upon a particular religion, the government is free to pass any law or engage in any practice that it deems necessary, as long as its motive is not discriminatory."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) (arguing the *Smith* decision is flawed in its use of legal sources and its theoretical argument); Elliot Mincberg, *A Look at Recent Supreme Court Decisions: Judicial Prior Restraint and the First Amendment*, 44 HASTINGS L.J. 871, 874 (1993) (noting first that groups as divergent as the American Civil Liberties Union and the National Association of Evangelicals supported RFRA, then noting that "constitutional liberty has been severely damaged by the decision in *Smith*"); Roald Mykkelvedt, Employment Division v. Smith*: Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603, 632-33 (1991) (noting the irony that *Smith* was issued on the eve of the two-hundredth anniversary of the Bill

prominent spur leading to the enactment in November, 1993 of the Religious Freedom Restoration Act.[3]

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of Rights:

> Even as the nation prepared to celebrate the bicentennial of that historic document, the Court acted to terminate the preferred status of one of the most fundamental rights contained therein, the right to practice one's religion free from unnecessary governmental restrictions. It seems almost inconceivable that such an abrupt and portentous rejection of firmly established constitutional law will not be overturned after the justices have fully reconsidered the implications of their ruling.);

Tom Stacy, *Death, Privacy, and the Free Exercise of Religion*, 77 CORNELL L. REV. 490, 559 (1992) (arguing "the guarantee of free exercise gives a person a presumptive right to act on sincere religious belief even when that action is proscribed by otherwise valid law. *Employment Division v. Smith* . . . is simply wrong."); Andrew M. Zeitlin, *A Test of Faith: Accommodating Religious Employees' "Work Related Misconduct" in the United States and Canada*, 15 COMP. LAB. L. 250, 271-72 (1994) (arguing *Smith* was "poorly drafted and relied largely on authorities long considered extinct," and was motivated by "an overreaction to the drug crisis."). *But see* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (arguing for the outcome of *Smith* but not for the Court's rationale).

3. The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (Supp. V. 1993), enacted November 16, 1993, provides in pertinent part:

> (a) Findings
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> The Congress finds that -
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> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
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> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
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> (3) governments should not substantially burden religious exercise without compelling justification;
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> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
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> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interest.
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> (b) Purposes
>
> The purposes of this Act are -
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government. (emphasis added).

For recent commentary beyond this symposium on RFRA, see Allan Ides, *The Text of the Free Exercise Clause As A Measure of* Employment Division v. Smith *and the Religious Freedom* Restoration Act, 51 WASH. & LEE L. REV. 135 (1994); Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1156 (1994) (While it attempts to correct the *Smith* decision, "RFRA is thin gruel for those who reject *Smith*'s narrow reading of the Free Exercise Clause. RFRA is a

Alfred Smith and Galen Rose, members of the Native American Church, were drug and alcohol counselors at the Douglas County Council on Alcohol and Drug Abuse, a private, non-profit rehabilitation center in Oregon.[4] They sacramentally ingested hallucinogenic peyote during a religious ceremony of the Native American Church. Their employment was then terminated, consistent with the employer's policy, which prohibited employee unlawful use of controlled substances. The Oregon Employment Division denied their claims for unemployment compensation, accepting instead the employer's position that the termination of employment was properly due to their work-related misconduct.[5] In a majority opinion by Justice Scalia, the Court found that the state's denial of unemployment compensation and, more fundamentally, but only implicitly, the termination of their employment did not violate the Free Exercise Clause of the First Amendment.[6] Thus, in its core aspects, the decision most responsible for leading to RFRA was grounded in (un)employment law.

I am a beggar at the banquet of this symposium, surrounded by nationally prominent scholars of law and religion. I have no such expertise, and I am here primarily as a labor and employment academic lawyer.[7] It is in this capacity that I wish to

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majoritarian protection subject to later repeal or modification by shifting political coalitions. Even if left intact, the statutory terms themselves may receive the same narrow reading as that given to the Free Exercise Clause in *Smith*." *Id.*)

4. *Smith*, 494 U.S. at 874.

5. *Id.*

6. *Id.* at 890.

7. I have integrated labor and employment law scholarship with themes of law and religion. *See, e.g.*, David L. Gregory, *Actualizing What Ought To Be: A Response To Professor Milner S. Ball*, 20 CAP. U. L. REV. 55 (1991); David L. Gregory, *Catholic Labor Theory And The Transformation Of Work*, 45 WASH. & LEE L. REV. 119 (1988) [hereinafter *Catholic*]; David L. Gregory, *Government Regulation Of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992); Gregory & Russo, *supra* note 2; David L. Gregory & Charles J. Russo, *Overcoming* NLRB v. Yeshiva University *By The Implementation Of Catholic Labor Theory*, 41 LAB. L.J. 55 (1990)[hereinafter *NLRB*]; David L. Gregory, *Teaching Moral Values In Public Schools: Some Constitutional Considerations*, 31 CATH. LAW. 173 (1987); David L. Gregory, *The First Amendment Religion Clauses And Labor Employment Law In The Supreme Court, 1984 Term*, 31 N.Y.L. SCH. L. REV. 1 (1986); David L. Gregory & Charles J. Russo, *The Return Of School Prayer: Reflections On The Libertarian - Conservative Dilemma*, 20 J.L. & EDUC. 167 (1991); David L. Gregory, *The Role Of Religion In the Secular Workplace*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 749 (1990); David L. Gregory, *Where To Pray? A Survey Regarding Prayer Rooms In A.B.A. Accredited, Religiously Affiliated Law Schools*, 1993 B.Y.U. L. REV. 1287 (1993); David L. Gregory, *The Religious, the Ethical, the Communal and the Future*, 41 CATH. U. L. REV. 651 (1992) (reviewing FREDERICK M. GEDICKS AND ROGER HENDRIX, CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE

probe some very current labor and employment law issues in the wake of RFRA, with special attention to the United States Equal Employment Opportunity Commission's (EEOC) proposed guidelines, purportedly designed to prohibit religious harassment in the secular workplace.[8]

(1991)); David L. Gregory, Book Review, 32 WAYNE L. REV. 191 (1985) (reviewing LEO PFEFFER, RELIGION, STATE AND THE BURGER COURT (1984)); David L. Gregory, Book Review, 29 CATH. LAW. 344 (1985) (reviewing RICHARD MARIUS, THOMAS MORE (1984)).

8. The proposed EEOC guidelines to prohibit harassment based on race, color, religion, gender, national origin, age, or disability, published on October 1, 1993, provide:

§ 1609.1 Harassment.

(a) Harassment on the basis of race, color, religion, gender, national origin, age, or disability constitutes discrimination in the terms, conditions, and privileges of employment and, as such, violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. [§] 2000e *et seq.* (title VII); the Age Discrimination in Employment Act, as amended, 29 U.S.C. [§] 621 *et seq.* (ADEA); the Americans with Disabilities Act, 42 U.S.C. [§] 12101 *et seq.* (ADA); or the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*, as applicable.

(b)(1) Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:

(i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;

(ii) Has the purpose or effect of unreasonably interfering with an individual's work performance; or

(iii) Otherwise adversely affects an individual's employment opportunities.

(2) Harassing conduct includes, but is not limited to, the following:

(i) Epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to race, color, religion, gender, national original, age, or disability; and

(ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age, or disability and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.

(c) The standard for determining whether verbal or physical conduct relating to race, color, religion, gender, national origin, age, or disability is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive. The "reasonable person" standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability. It is not necessary to make an additional showing of psychological harm.

(d) An employer, employment agency, joint apprenticeship committee, or labor organization (hereinafter collectively referred to as "employer") has an affirmative duty to maintain a working environment free of harassment on any of these bases. Harassing conduct may be challenged even if the complaining employee(s) are not specifically intended targets of the conduct.

In this article, Part I will present a brief overview of Title VII of the Civil Rights Act of 1964, which generally prohibits discrimination in employment on the basis of religion, and which

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(e) In determining whether the alleged conduct constitutes harassment, the Commission will look at the record as a whole and at the totality of the circumstances, including the nature of the conduct and the context in which it occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

§ 1609.2 Employer liability for harassment.

(a) An employer is liable for its conduct and that of its agents and supervisory employees with respect to workplace harassment on the basis of race, color, religion, gender, national origin, age, or disability:

(1) Where the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action; or

(2) Regardless of whether the employer knew or should have known of the conduct, where the harassing supervisory employee is acting in an "agency capacity." To determine whether the harassing individual is acting in an "agency capacity," the circumstances of the particular employment relationship and the job functions performed by the harassing individual shall be examined. "Apparent authority" to act on the employer's behalf shall be established where the employer fails to institute an explicit policy against harassment that is clearly and regularly communicated to employees, or fails to establish a reasonably accessible procedure by which victims of harassment can make their complaints known to appropriate officials who are in a position to act on complaints.

(b) With respect to conduct between co-workers, an employer is responsible for acts of harassment in the workplace that relate to race, color, religion, gender, national origin, age, or disability where the employer or its agents or supervisory employees knew or should have known of the conduct, and the employer failed to take immediate and appropriate corrective action.

(c) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace related to race, color, religion, gender, national origin, age, or disability where the employer or its agents or supervisory employees knew or should have known of the conduct and failed to take immediate and appropriate corrective action, as feasible. In reviewing these cases, the Commission will consider the extent of the employer's control over non-employees and any other legal responsibility that the employer may have had with respect to the conduct of such non-employees on a case-by-case basis.

(d) Prevention is the best tool for the elimination of harassment. An employer should take all steps necessary to prevent harassment from occurring, including having an explicit policy against harassment that is clearly and regularly communicated to employees, explaining sanctions for harassment, developing methods to sensitize all supervisory and non-supervisory employees on issues of harassment, and informing employees of their right to raise, and the procedures for raising, the issue of harassment under title VII, the ADEA, the ADA, and the Rehabilitation Act. An employer should provide an effective complaint procedure by which employees can make their complaints known to appropriate officials who are in a position to act on them. 58 Fed. Reg. 51268 (1993) (to be codified at 29 C.F.R. § 1609) (proposed Oct. 1, 1993, but withdrawn Oct. 11, 1994).

also requires the employer to reasonably accommodate the employee's religious practices.[9] Part I will also examine the very few reported cases that prohibit secular private employers from imposing unwelcome religious practices on subordinate employees as a condition of employment. Part II will assess the EEOC proposed guidelines, designed to prohibit religious harassment in the workplace. The proposed guidelines were first published by the EEOC in the Federal Register on October 1, 1993. Ironically, this was more than six weeks before President Clinton signed RFRA into law on November 16, 1993. After the EEOC received more than 100,000 mostly negative comments, and following highly critical congressional hearings in June, 1994, on August 20, 1994, Congress approved an appropriations bill instructing the EEOC to scrap the proposed guidelines.[10] Because the

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9. Title VII defines "religion" as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. [§] 2000e(j) (1988).

10. On August 20, 1994, Congress approved an appropriations bill instructing the EEOC to scrap its proposed guidelines on religious harassment. The vote was overwhelming. The House of Representatives voted 366 to 37 to eliminate funding for the rules, and the Senate voted 94-0 to reject the EEOC proposed guidelines. On August 26, 1994, President Clinton signed that bill into law. Jay W. Waks & Christopher R. Brewster, *Proposed EEOC Guidelines on 'Religious Harassment' Provoked a Firestorm of Criticism, Causing the Agency to Pull Back For Now*, NAT'L L.J., September 12, 1994, at B5. On September 19, the EEOC responded to this virulent opposition by voting 3-0 that the "Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability" be "withdrawn from consideration." Larry Witham, *Work Rules on Religion Dropped; Amid Uproar, EEOC Backs Off*, WASH. TIMES, September 21, 1994, at A1. "With the general public outcry and the legislation in Congress, the Commission just felt the guidelines should be withdrawn," said EEOC spokesman Michael Widomski. *Id.*

In rejecting the EEOC proposed guidelines, the President and Congress reacted to a "virtual firestorm of opposition" from groups that feared that the guidelines' vagueness on regulating religious expression in the workplace was constitutionally suspect and difficult to apply. Waks & Brewster, *supra*, at B7. The EEOC received more that 100,000 comments, the vast majority opposed to the regulations. *Id.* While some lawmakers and the Anti-Defamation League of B'nai B'rith supported the proposed guidelines, Christian legal groups, family advocacy lobbies, and the American Civil Liberties Union all opposed the rules. Witham, *supra*, at A1.

Dudley C. Rochelle, a labor lawyer from Atlanta, Georgia, is credited—or blamed—for the demise of the proposed guidelines. The protest movement began in November, 1993, after Rochelle sent a letter to business clients indicating that employers could only avoid religious harassment lawsuits by banning all religious expression in the workplace, including prayer groups and bibles. Gayle White, *Atlanta Lawyer Complained; EEOC Scraps Harassment Guidelines*, ATLANTA J. & CONST., Sept. 23, 1994, at A5. In late January, she released a twenty-one page analysis of

EEOC will eventually return to the issue, and because religious harassment in the workplace ought not to occur without a remedy, the guidelines will merit future reconsideration. Part III of the article provides a discussion of the role of Title VII in addressing religious harassment in the workplace. Finally, Part IV will offer some concluding thoughts.

I. TITLE VII DISCRIMINATION AND REASONABLE ACCOMMODATION: AN OVERVIEW

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of, *inter alia*, religion. Title VII also requires the secular employer to provide reasonable accommodation of the religiously-affiliated employee's religious practices.[11] The statute also allows the religious, non-secular employer

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the proposed guidelines as religious groups began lobbying Congress and lawmakers started to question the rules. Witham, *supra*, at A1. "It's been amazing for me to see how this thing arose entirely from the grass roots," Rochelle said. *Id.*

While the vote in the Senate was unanimous, not all senators felt that the EEOC proposed guidelines should be scrapped. Sen. Howard Metzenbaum, an Ohio Democrat, argued in favor of the rules at Senate hearings, and called fears that the proposed guidelines would be abused "absurd." *Id.* Metzenbaum reportedly believed that the withdrawal of religious harassment from any EEOC guidelines send the signal that religious harassment is less objectionable than other forms. *Id.* Senator Howard Heflin, a Democrat from Alabama and active critic of the proposed guidelines, called the EEOC's decision to discard the proposed guidelines "a victory for religious freedom." *Religious Harassment Rules Shelved*, L.A. TIMES, Sept. 21, 1994, at A17.

However, in passing the bill that pulled the plug on the present guidelines, Congress left the EEOC open to propose new regulations on religious harassment. "Any new guidelines . . . shall be drafted so as to make explicitly clear that symbols or expressions of a religious belief consistent with the First Amendment and the Religious Freedom Restoration Act of 1993 are not to be restricted and do not constitute proof of harassment." H.R. CONF. REP. NO. 708, 103rd Cong., 2nd Sess. 94 (1994). In fact, Congress instructed the EEOC to hold public hearings and receive public comment on any new guidelines of religious harassment that it might propose. Waks & Brewster, *supra* at B7.

While EEOC spokesman Widomski indicated that "[t]here are no plans at this point to revisit [religious harassment rules]," White, *supra* at A5, both opponents and supporters of the EEOC's decision to scrap the proposed guidelines do not believe that the effort to broaden harassment rules to include religion is dead. Witham, *supra* at A1. With three new members joining the EEOC, the commission is likely to try again and draft a new set of harassment guidelines including religion. *Id.* "The fact [the EEOC] withdrew [the proposed guidelines] in toto could mean that they would rather drop it and begin work on the same thing again," said Rochelle. *Id.*

11. *See* David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992); David L. Gregory, *The Role of Religion for the Secular Workplace*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 749 (1990) [hereinafter *Role of Religion*].

to require its employees to adhere to the tenets of the religion.[12] The Supreme Court has held that these Title VII provisions do not violate the Establishment Clause of the First Amendment, despite potential facial tensions between Title VII's religion provisions and the Establishment Clause of the Constitution.[13] Title VII, the First Amendment Religion Clauses, RFRA, and possible future EEOC guidelines, can all be brought to bear upon issues of religion in the secular workplace.

The Title VII requirement that the secular employer reasonably accommodate the religious practices of the employee has been utterly minimized by the Court. In 1986, the decision of the Supreme Court in *Ansonia Board of Education v. Philbrook*[14] reaffirmed and strengthened its 1977 decision in *TWA v. Hardison*.[15] In both cases, the Court supported collective bargaining agreement constraints on the scope of reasonable accommodation. Hardison, a Sabbatarian, was employed as a union-represented TWA clerk in a twenty-four hour, 365-day operation at the stores department of the airline's Kansas City base. While working on the eleven p.m. to seven 7 a.m. shift, he had sufficient seniority to avoid working on his Sabbath. But when he transferred to another building and shift, he lost seniority; therefore, when he refused to work on his Sabbath, he was discharged.[16] Because of the labor contract terms, the Court found that any further alternative reduced work schedules or substitutions were not feasible and would have been unreasonable accommodations not required by law.

Philbrook, a teacher, had three paid days annually for religious observance, pursuant to the terms of the labor contract. He wanted to use additional contractual personal leave time for additional religious observance or, in the alternative, he wanted his employer to allow him to pay a substitute worker for these occasions. As in *Hardison*, the Court in *Philbrook* found that these alternative proposals to accommodate the employee's religious practices were unreasonable and therefore were not required by Title VII.[17] With these two leading decisions, Title VII has been rendered largely meaningless as a source of protection for the religiously observant employee of the secular employer.

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12. Gregory, *Role of Religion*, *supra* note 11, at 754.
13. *Id.*
14. 479 U.S. 60 (1986).
15. 432 U.S. 63 (1977).
16. *Id.* at 66-69.
17. 479 U.S. at 68-71.

Unlike Title VII, prior to *Smith*, the First Amendment Free Exercise Clause protected, at least to some extent, Sabbatarians who were unable to work on their Sabbath. While they could be lawfully terminated from their employment, they at least were able to collect unemployment compensation. *Hobbie v. Unemployment Appeals Commission of Florida*[18] in 1987 reaffirmed and strengthened this line of Supreme Court decisions from *Sherbert v. Verner*[19] in 1963 through *Thomas v. Review Board*[20] in 1981. *Frazee v. Illinois Department of Employment Security*[21] in 1989 extended unemployment compensation eligibility to even a "generic Christian" who refused to work on Sunday. Although interrupted by *Smith*, this limited free exercise right has been restored by RFRA.

Lower courts have only rarely been presented with the conundrum of whether the law can simultaneously protect the free exercise rights of religiously identified persons and of those who wish to be free from such practices. These cases have most often arisen in the particular context of prayer services in the secular workplace. For example, *Young v. Southwestern Savings and Loan Ass'n*[22] perfectly illustrates the tensions that occur when a secular private sector employer's managerial agents impose unwelcome religious practices on subordinate employees as a condition of employment.

Mrs. Young began employment as a teller for the bank in February, 1971. She knew that all employees were required to attend a monthly staff meeting at the downtown office of the bank. Employees were paid for these fourty-five minute meetings, which reviewed bank business ranging from organization policy to future planning. The problem for Mrs. Young, a former Unitarian and now an atheist, was that the monthly meeting began with a "short religious talk and a prayer, both delivered by a local Baptist minister."[23]

Mrs. Young attended the first two monthly meetings, but thereafter resolved no longer to attend because she felt that her freedom of conscience was being violated by the convocation prayers. She did not mention this to anyone. She simply ceased

18. 480 U.S. 136 (1987).
19. 374 U.S. 398 (1963).
20. 450 U.S. 707 (1981).
21. 989 U.S. 829 (1989).
22. 509 F.2d 140 (5th Cir. 1975). For extensive discussion of this case, also see Gregory, *Role of Religion*, *supra*, note 11 at 757.
23. 509 F.2d at 142.

her attendance. Her absence was finally noted at the September, 1971 monthly meeting. Management informed her that her attendance was mandatory and that the primary purpose of the monthly meeting was discussion of bank business. She was told that she "had an obligation to attend the entire meeting, and advised her that if she objected to the devotionals, she could simply 'close [her] ears' during that time."[24] She disclosed her reason for not attending the meetings, and because she would not compromise her beliefs, she involuntarily resigned "in order to escape intolerable and illegal employment requirements."[25] She later maintained that she was constructively discharged.

The Fifth Circuit held in her favor and reversed the discharge. The court found "that Mrs. Young was constructively discharged in circumstances which amounted to religious discrimination against her by Southwestern."[26] The court of appeals immediately focused on the opening prayer at the mandatory monthly bank business meeting as unlawful employment discrimination on the basis of religion, in violation of Title VII. "This theological appetizer, nondenominational though it might be, was somewhat uncongenial to plaintiff, who is an atheist."[27]

In September of 1988, the Ninth Circuit further elucidated these complex issues in *E.E.O.C. v. Townley Engineering and Manufacturing Company*.[28] The Ninth Circuit's opinion, and the formidable dissent of Judge John Noonan,[29] recognized the inherent tensions between the prayer activities in the workplace of the religiously-affiliated supervisors, and the contrary practices or non-affiliations of subordinate employees. The court of appeals held that an atheist employee who affirmatively objected could not be compelled to attend the religious services sponsored upon the premises of the employer, a mining equipment manufacturer. The court found that the free exercise rights of the religiously identified owners of secular corporations must, on balance, yield to the Title VII protection afforded to objecting employees: "Where the practices of employer and employee conflict, as in

24. *Id.*
25. *Id.* at 144.
26. *Id.* at 143.
27. *Id.* at 142.
28. 859 F.2d 610, (9th Cir. 1988), *cert. denied*, 589 U.S. 1077 (1989); *see* Gregory, *Role of Religion, supra* note 11.
29. Prior to his appointment to the Ninth Circuit by President Reagan, Judge Noonan was a professor of law at Notre Dame and at the University of California at Berkeley Boalt Hall School of Law. He has a Ph.D. in Philosophy from the Catholic University of America and law degree from Harvard.

this case, it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee's Title VII rights."[30]

The closely held corporation was founded in 1964 by Jake and Helen Townley, who own ninety-four percent of the stock. It manufactures mining equipment for commercial profit at several different facilities. When the Townleys, who are born-again Christians, founded the business, they "made a covenant with God that their business would be a Christian, faith-operated business."[31] The company printed and enclosed Gospel quotes on all of its documents and mail, and financially supported missionaries.

It held weekly religious devotional services in the workplace. "They typically last[ed] from thirty to forty-five minutes, and [variously] included prayer, thanksgiving to God, singing, testimony, and scripture reading, as well as discussion of business related matters. Townley required all employees to attend the weekly services; failure to attend was regarded as equivalent to not attending work."[32] These services have been conducted at the corporation's Florida facility since it commenced operations in 1963. It opened an Arizona facility in 1973, but did not institute the weekly religious devotional services there until 1984. An atheist employee, hired at the Arizona facility in 1979, objected to the services shortly after they were instituted in 1984.[33] The trial court granted summary judgment in favor of the plaintiff, ruling that requiring employees to attend its religious services and failing to accommodate the atheist employee's requests to be excused violated Title VII.

Upon review, the Ninth Circuit held:

> Congress did clearly intend for Title VII to cover Townley's mandatory devotional services. Sections 701(j) and 703(a) of Title VII make clear that requiring employees over their objections to attend devotional services cannot be reconciled with Title VII's prohibition against religious discrimination. Furthermore, we hold that Congress did not intend section 702's exemption for religious corporations to shield corporations such as

30. *Townley*, 859 F.2d at 621.

31. *Id.* at 612.

32. *Id.*

33. *Id.* The atheist employee shortly thereafter left the company, claiming constructive discharge. In April, 1988, the district court ruled in favor of the employee; the constructive discharge issue, however, was not before the Ninth Circuit.

> Townley. We do hold, however, that Jake and Helen Townley have certain rights under the Free Exercise Clause that Title VII cannot infringe.[34]

Although the owners were devoutly religious, their corporation was secular in its purpose and operation; it manufactured mining equipment. Therefore, it could not claim the status of a religious corporation within the meaning of section 702 of Title VII. The religious affiliations and practices of the individual owners did not transform the secular corporation into a religious organization. "We merely hold that the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702."[35]

The employer admitted that it never attempted to accommodate the atheist employee's objections to the religious services. The employee was told he could wear earplugs and/or read a newspaper, but he had to be physically present. Despite the dissent's view that these conditions were a sufficient accommodation, the majority of the court agreed with the employee's proposal that the employer must reasonably accommodate his request to be excused from attendance, ruling that "the burden of attempting an accommodation rests with the employer rather than the employee."[36] The owners' free exercise rights would have to yield to the Title VII right of the objecting employee to be excused from attending the employer's religious services. The court emphasized that the employer's Arizona facility operated for its first eleven years, from its opening in 1973 to 1984, without the weekly religious services. The inclusion of some business discussions in the weekly meeting was not sufficient to free the weekly meeting of its inherently religious nature. The Ninth Circuit defined the heart of the employee's Title VII protections: "Protecting an employee's right to be free from forced observance of the religion of his employer is at the heart of the Title VII's prohibition against religious discrimination."[37]

Nevertheless, the Ninth Circuit concomitantly recognized the owners' admittedly subordinated free exercise rights, and narrowed the scope of the lower court's injunction. The district court improperly enjoined all mandatory religious services at the

34. *Id.* at 613.
35. *Id.* at 619.
36. *Id.* at 615.
37. *Id.* at 620-21.

employer's Arizona facility. This was unduly broad, and unnecessarily trammelled the owners' free exercise rights. Rather, only those employees who objected to attending the religious services and asked to be excused from physically attending would be protected. Otherwise, the mandatory nature of the services alone was not a sufficient basis upon which to support the original injunction. This careful judicial tailoring of the respective parties' interests may hold the key to satisfactory judicial construction of any future EEOC proposed guidelines.

II. THE PROPOSED RELIGIOUS HARASSMENT GUIDELINES OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

One can best acquire the flavor of the controversy surrounding the EEOC proposed guidelines by surveying the June 9, 1994 testimony before Congress by proponents and critics of the proposed guidelines. Although even the proponents conceded the guidelines' potential problems with unconstitutional vagueness, probable conflict with RFRA and the First Amendment right of free exercise of religion, the practical bases that warrant further careful consideration of the guidelines, such as those augured in the *Townley* decision, will continue to occur.

A. Supporting Arguments

Marc Stern, of the American Jewish Congress, argued that religious harassment, no less than racial or sexual harassment, could result in the denial of equal opportunity.[38] He maintained that the religious harassment guidelines should be retained because religious harassment is still a "real problem." According to EEOC statistics, over 500 religious harassment complaints are filed annually—a fifth of all religious discrimination complaints brought before the EEOC. Stern equated any removal of religious harassment from the EEOC guidelines as tantamount to sending the message that religious harassment was not taken seriously or was not illegal. He did, however, recognize that the EEOC must further clarify the proposed guidelines. Stern analogized religious harassment to sexual harassment; likewise, to be unlawful, religious harassment must be sufficiently severe

38. Religious Freedom Restoration Act: Hearings on S.B. 578 Before the Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary, 103rd Cong., 1st Sess. (June 9, 1994) (testimony of Marc D. Stern on behalf of the American Jewish Congress).

or pervasive to alter the conditions of the victim's employment or to create an abusive working environment. He concluded that proselytizing is not religious harassment, and provided several general principles that the EEOC could adopt:

- employees may not be compelled to participate in religious or anti-religious activities;

- employers, supervisors, and employees may engage in passive religious speech, display posters, slogans, or wear religious medals, buttons, or jewelry;

- in assessing whether a hostile work environment exists, the fact-finder must remember that religious speech is a very important value in society;

- where an employee is approached about a religious theme by an employer, supervisor, or another employee, and then asks that the discussion stop, that employee's request should ordinarily be honored;

- persistent repeated efforts to proselytize could constitute harassment; and

- employers are required to reasonably accommodate employee requests seeking insulation from even passive religious speech.

This may be the salient weakness in the EEOC guidelines: if an employee asks to have a religious symbol removed from the personal work area, the employee must be accommodated. This would indicate to employers that the only safe way to avoid controversy and allegations of religious harassment is to maintain a religion-free workplace. One employee may display religious symbols, but another may ask that they be removed. One employee cites free exercise rights, while the other employee alleges a hostile work environment. The proposed guidelines favor the latter in each instance.

Elizabeth M. Thornton, acting counsel of the EEOC, testified that the conception that the proposed guidelines were designed to suppress religious expression was simply wrong.[39] Instead, she maintained that the guidelines were designed to explain and interpret existing law, rather than to create new causes of action. The EEOC proposed guidelines were the work of Joy Cherian, and were designed to address all types of prohibited ha-

39. Religious Freedom Restoration Act: Hearings on S.B. 578 Before the Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary, 103rd Cong., 1st Sess. (June 9, 1994) (Testimony of Elizabeth M. Thornton on behalf of the EEOC).

rassment. The EEOC, in drafting the proposed guidelines, carefully considered decades of judicial and commission precedent. Drafters recognize workplace harassment offends Title VII's broad principle of workplace equality. Thornton also acknowledged that the EEOC needed to clarify further the proposed guidelines, to comply with RFRA.

Douglas Gallegos, executive director of the EEOC, testified that the guidelines provide that conduct towards an employee constitutes unlawful harassment only when it is unwelcome and when it severely or pervasively denigrates or shows hostility on the basis of religion.[40] His testimony was directly analogous to the long-established and Supreme Court-endorsed EEOC guidelines prohibiting sexual harassment in the workplace.[41]

B. Critical Arguments

One of the strongest critics of the EEOC proposed guidelines was Representative Howard P. McKeon. In his testimony before Congress, he said that the guidelines were "irresponsible", redefined harassment beyond the standards set forth by the Supreme Court, and could result in the infringement of religious liberty.[42] He particularly took aim at the EEOC's expansion of employer liability to an employee's friends, family, and associates, which in his estimation, would necessitate a "religion-free" workplace. McKeon said the EEOC's "lumping" of religious harassment with sexual harassment was "irresponsible and unnecessary, as if the two were equally offensive."[43]

Louis P. Sheldon, Chairman of the Traditional Values Coalition, testified that the proposed guidelines were too broad and rested on subjective factors, and that constitutionally protected religious expression could easily be punished as harassment.[44]

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40. Religious Freedom Restoration Act: Hearings on S.B. 578 Before the Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary, 103rd Cong., 1st Sess. (June 9, 1994) (testimony of Douglas Gallegos on behalf of the EEOC).

41. The EEOC guidelines prohibiting sexual harassment in employment as an unlawful form of sex discrimination, promulgated in 1980, have twice been sustained by the unanimous Supreme Court. Harris v. Forklift Systems, 114 S.Ct. 367 (1993); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

42. Religious Freedom Restoration Act: Hearings on S.B. 578 Before the Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary, 103rd Cong., 1st Sess. (June 9, 1994) (testimony of Howard P. McKeon on behalf of the 25th District of California).

43. *Id.*

44. Religious Freedom Restoration Act: Hearings on S.B. 578 Before the

He also expressed concern equating religious harassment with harassment based on race, national origin, or sex. He warned that the guidelines, which specify that an employer has an affirmative duty to maintain a working environment free of harassment, would compel an employer to ban all religious activity and religious expression.

Robert S. Peck, legislative counsel of the American Civil Liberties Union, warned that the proposed guidelines failed to reflect sufficient sensitivity to constitutional problems created by attempts to regulate expression, and could unlawfully inhibit protected First Amendment free expression.[45] However, he lauded the efforts of the EEOC and urged the EEOC not to drop religion from the guidelines but, rather, to rewrite the guidelines. He urged the EEOC to incorporate its own "Fact Sheet" into the guidelines, because it better defined the EEOC's goal: a reasonable person standard of what was abusive or hostile; an isolated instance would not be an offense; recognizing the difference between passive religious speech, and that which is sufficiently severe or pervasive to create a hostile work environment. He also called on the EEOC to provide further examples of what would constitute harassment. He disagreed with Representative McKeon's opinion that religion ought to be dropped from the guidelines entirely, saying that deletion serves no useful purpose and will be harmful to those who need the protection of the law.

Professor Douglas Laycock of the University of Texas School of Law testified that the guidelines would violate the First Amendment and RFRA because of vagueness and not being sufficiently narrowly tailored to satisfy RFRA.[46] He used as an example of the imprecision of the guidelines the atheist who feels that religious symbolism or speech is inherently abusive and hostile; the atheist probably feels all religious icons make the workplace hostile.

Laycock suggested that *quid pro quo* religious harassment

Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary, 103rd Cong., 1st Sess. (June 9, 1994) (testimony of Louis P. Sheldon on behalf of the Traditional Values Coalition).

45. Religious Freedom Restoration Act: Hearings on S.B. 578 Before the Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary, 103rd Cong., 1st Sess. (June 9, 1994) (testimony of Robert S. Peck on behalf of the ACLU).

46. Religious Freedom Restoration Act: Hearings on S.B. 578 Before the Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary, 103rd Cong., 1st Sess. (June 9, 1994) (testimony of Professor Douglas Laycock).

could be prohibited, as well as religious epithets, slurs, and negative stereotypes. Persistent proselytizing, after repeated requests not to do so, could be harassment. However, affirmative expressions of one's own religious beliefs, or lack thereof, would not be harassment. Neither would religious or political propositions, since this would be constitutionally protected free speech. Instead of the current plethora of the guideline terms, such as "intimidating," "denigrates," and "aversion," he urged the EEOC to retain only "hostile" and "abusive" as terms describing unlawful harassment.

Professor Laycock offered several hypothetical examples across a spectrum to elucidate revised guidelines that he could support:

- An employee tells another during a coffee break that he believes Jesus Christ is the only way to salvation and that non believers are destined for eternal damnation. This would not be a violation, because it is a zealous statement of one's belief and not a personalized or disparaging attack on another employee or religion.

- A Muslim employee distributes tracts to co-workers which communicate that there is no God but Allah, and that Mohammed is his prophet. Likewise, this would not be a violation.

- A Jewish employee wears a yarmulke, hangs a Star of David on his office wall, and put a mezuzah on his office door. This would not be a violation, because wearing or displaying religious symbols does not disparage other employees or religious groups.

- An atheist employer, with strong pro-choice views, keeps a sign on her desk saying, "Keep your rosaries off my ovaries," and circulates a fund-raising letter from a non-profit organization referring to "right-wing Christian bigots." This would not be a violation, although it is a closer case than the previous examples. While it may be read as an epithet, the slogan is meant to be colorful and memorable.[47]

- An employee whistles "Onward Christian Soldiers" and other hymns regularly, and refers to herself as a "prayer warrior." This is not a violation, because it does not disparage anyone or any religion.

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47. Only a few days before Professor Laycock offered this hypothetical example in his June, 1994 testimony before the Senate, a federal district court ruled that, under Title VII, an employer was not required to accommodate an office employee wearing a graphic anti-abortion button. Wilson v. U.S. West Communications, 860 F. Supp. 665 (D. Neb. 1994).

- A Jewish supervisor suggests that a subordinate, who has revealed that he is experiencing a marital crisis, would benefit from a marriage counseling service run by the Jewish supervisor's synagogue. This is not a violation, because an invitation or suggestion that one participate in a religious event is not harassment.

- An employer leads a daily Bible study at lunch hour, which most of the employees voluntarily attend. Some attendees have informed non-attendees that the group has prayed for them. This is not a violation, because it does not disparage those who did not attend.

- A Hindu employer often invites employees to temple ceremonies and religious festivals. The employees consistently decline the invitations, but never express offense. This is not a violation, because the employees never indicated that the invitations were unwelcome.

- A nonreligious supervisor often uses expressions "Jesus Christ" and "God damn" when angry or frustrated, often in the presence of Christian employees, who have asked him to stop on the grounds that such cursing violates the Third Commandment. While this is not a violation of the proposed guidelines, Professor Laycock indicated that he would have no objection if this were regarded as a borderline case.

- A supervisor and employee frequently direct religious slurs and taunts at another employee. This would clearly constitute religious harassment.

Michael Whitehead, general counsel for the Southern Baptist Convention Christian Life Commission, testified that religious harassment should not be included in the "one-size-fits-all" guidelines.[48] He maintained that religion ought to be deleted from the proposed guidelines, citing many obvious differences between religious and sexual harassment; only free exercise of religion is expressly protected by the First Amendment. He also criticized the guidelines as overly broad, especially the current absence of the requirement of unwelcomeness. The overall effect, he predicts, would be an unconstitutional chilling effect on free religious expression in the workplace and would create religion-free workplaces.

48. Religious Freedom Restoration Act: Hearings on S.B. 578 Before the Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary, 103rd Cong., 1st Sess. (June 9, 1994) (testimony of Michael K. Whitehead, J.D., on behalf of the Southern Baptist Convention).

No prominent cases dealing with labor or employment issues directly involving RFRA have yet been reported. All of the major critics of the EEOC proposed guidelines, however, voiced fears that the guidelines would have the effect of suppressing religion in the workplace in violation of both RFRA and the First Amendment Free Exercise Clause.[49]

Additionally, the proposed reasonable person test of the guidelines was criticized. Unlike sexual harassment cases with the standard of a reasonable woman, in the proposed religious harassment cases, the employer has no real knowledge of the appropriate legal standard by which to measure speech and conduct. Instead, the reasonable person would be gauged from the perspective of the reasonable victim, according to the guidelines.

The critics generally focused on the fact that the guidelines fail to distinguish between religious expression, slurs, derogatory comments, and hostile work environment. The guidelines also violate RFRA because they are not the least restrictive means of promoting free expression.[50]

III. DISCUSSION

Sexual harassment is egregious, outrageous, and unlawful on its face. While First Amendment freedom of expression, association, speech, and press may be implicated in some instances of possible sexual harassment, sexual harassment itself enjoys no constitutional protection. However, free exercise of religion, expressly protected by the First Amendment, is perhaps the most fundamental human freedom. Unlawful sexual harassment and constitutionally protected free exercise of religion are worlds apart. But worlds can collide. In some instances, unlawful religious harassment can be the perniciously transmogrified consequence of uncompromising and intolerant religious practices.

Does pernicious religious harassment continue to afflict the secular workplace? Most definitely. On August 3, 1994, for example, the Maine Supreme Judicial Court, in *Finnemore v. Bangor Hydro-Electric Co.*,[51] found that a fundamentalist Christian employee may have been a victim of unlawful religious harassment in the workplace, in violation of the Maine Human Rights Act.

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49. *See, e.g., supra* notes 42-48.

50. *See* Johnson v. County of Los Angeles Fire Dep't, 865 F. Supp. 1430, 1440-46 (C.D. Cal. June 9, 1994) (upholding fire department employee's First Amendment right to read soft-core pornography in the workplace, despite sexual harassment law prohibition of such unwelcome depictions of women within the magazines).

51. 645 A.2d 15 (Me. 1994).

Co-workers routinely made sexually explicit comments regarding one another's spouses. When the Christian employee complained to co-workers that he found their comments offensive to his religious beliefs, they then viciously made his wife the subject of their sexually denigrating remarks. The Maine court found that one element of a religious harassment claim under the state law was that the precipitating comments must be of a "religious nature," and that a test for determining whether a comment is of such a nature is whether it was made because of the individual's religious beliefs or would not otherwise have occurred but for the individual's religion. Because these are questions of fact, the Maine Supreme Judicial Court reversed the lower court's summary judgment for the employer and remanded the case for trial.[52]

When Title VII was enacted, the primary emphasis of the statute was to protect more fully and adequately the religious practices of those discrete and insular minorities not fully able to otherwise assert their religious rights in majoritarian environments.[53] The contemporary situation in employment contexts can often be markedly different. It may not always be the subordinate employee as religious practitioner who must be protected from antireligious secular employers.[54] Rather, in a fashion that the drafters of Title VII never anticipated, it may be the atheist, agnostic, non-aligned, or otherwise-aligned subordinate employee who asserts the protections of Title VII. This is one, but only one, important new dimension of the complex contemporary

52. *Id.* at 17. For other cases regarding religious harassment in the secular workplace, see, for example, Smallzman v. Sea Breeze, 60 Fair Emp. Prac. Cas. 1031 (BNA) (D. Md. 1993) (holding a Jewish employee who endured anti-Semitic harassment stated a claim for intentional infliction of emotional distress); Turner v. Barr, 806 F.Supp. 1025 (D.D.C. 1992) (enjoining religious slurs by employees, contrary to employee's religious beliefs); Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984) (holding a Jewish employee subjected to religious slurs and demeaning criticism in front of other workers was able to proceed with claim of unlawful religious harassment). *See also* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1804 (1992) (discussing cases regarding religious harassment in the secular workplace).

53. *See* U.S. v. Carolene Products, 304 U.S. 144, 152, n.4 (1938).

54. Until *Smith*, the Supreme Court had been at least nominally solicitous of protecting the free exercise right of the religious minority practitioner in secular employment. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (holding Florida's denial of unemployment compensation to Sabbatarian who refused to work on her sabbath violated her free exercise right). *But see* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1987) (holding Title VII reasonable accommodation duty of employer towards religious employee's practices is no more than *de minimis*).

debate.

Five years ago, before *Smith* and certainly before any EEOC proposed guidelines, I anticipated situations where religious activities in the workplace could potentially be analogized to unlawful sexual harassment. My preliminary concerns then are even more apt now. As I said in 1990 in my article in the *Notre Dame Journal of Law, Ethics & Public Policy*:

> The initial request or suggestion or invitation extended by senior management to subordinate employees to attend, for example, a prayer meeting or a prayer breakfast, or the opening of a business meeting with a prayer, will more likely be unexpected or surprising rather than inherently unwelcome or repugnant. Employees may feel nonplussed, embarrassed, curious, or uncomfortable, but it is not likely that most employees would find the first overture to pray inherently reprehensible. This is not to say that, as in tort law, the first bite is free and that there can never be any harm caused by asking.[55] Religion rarely leaves one completely unaffected. While adult employees are not as susceptible to institutional prayer as the public school children in *Engle v. Vitale*[56], the initial exposure to prayer may quickly transmogrify into an unwelcome, unpleasant experience for the subordinate employee.
>
> But neither is this to equate prayer with, for example, sexual harassment. Prayer is inherently affirming. Sexual harassment has nothing whatever affirming about it, and is inherently repulsive. For committed atheists, prayer is a silly waste of time. Of course, for the atheist or for the employee identified with another religion, coerced, involuntary submission to prayer certainly could quickly become fully as unwelcome as sexual harassment. Coerced prayer potentially can be religious harassment (to say nothing of how the prayer itself is also debased). The core test to determine whether unlawful employee sexual harassment has occurred is whether the overture is unwelcome.[57] Objectively, sexual harassment is egregiously, tortiously offensive by its very essence; prayer is not. But if the prayer environment becomes coerced and involun-

55. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1055 (1936).

56. 370 U.S. 421 (1962); *see also* Wallace, Gov. of Ala. v. Jaffree, 472 U.S. 38 (1985) (holding Alabama moment of silence statute, which expressly encouraged silent prayer, violated Establishment Clause).

57. Meritor v. Savings Bank, 477 U.S. 57, 68 (1986) ("The correct inquiry is whether [the victim] by her conduct indicated that the sexual advances were unwelcome"). *See also* Equal Employment Opportunity Commission's Guidelines on Sex Discrimination, 29 C.F.R. 1504.11 (1986).

tary, it potentially can become as offensive and as repugnant as unlawful sexual harassment.[58]

The American Bar Association advertises a member's prayer group session at its annual meeting. Members of the United States Congress hold prayer meetings. Why cannot private employees do the same? RFRA would seem to protect their rights; the EEOC proposed guidelines would seem to abolish them. But religious harassment is not really about prayer; it is about repeated, unwelcome conduct.

The United States has historically been a religious nation. People have struggled for millennia over how to live a holy life in the secular city.[59] The Constitution expressly protects the free exercise of religion as one of our most important rights.

It is unlikely that any government agency can perfectly calibrate the ideal balance to maximize the most fundamental religious values while protecting others' potentially contradictory rights. But it is not a perfect world that lawyers are obliged to work within.[60] Therefore, the EEOC proposed guidelines, if responsibly revised, will merit future careful consideration. Prayer is perhaps the best good faith example of the well-intentioned person engaged in religious belief manifestation in the secular workplace, especially if the prayer occurs in a silent, or largely quiet and low key, fashion. But prayer with a more proselytizing, evangelical dimension can become quickly problematic, vis-a-vis other workers.

But let's face it. Religious harassment usually will be about overt conduct, and not about prayer in the least intrusive and quiet environments that the prior discussion generally has posited. Neither is sexual harassment usually about good faith, nonintrusive conversation; sexual harassment usually has a much more direct, confrontational overt action component to it.

Prohibiting religious harassment in the workplace would not force religious employees to artificially trifurcate their personal and professional and internal prayer lives, just as sexual harassment prohibition does not force one to deny their sexuality. Rather, prohibition of religious harassment and of sexual harassment should properly be about protecting the other person from the

58. Gregory, *Role of Religion*, *supra* note 11 at 756-57.

59. SAINT AUGUSTINE, CITY OF GOD (1950); HARVEY G. COX, THE SECULAR CITY (1966).

60. ANTHONY KRONMAN, THE LOST LAWYER (1993). (Lawyers must apply prudence and practical wisdom to seek solutions in inherently imperfect environments.)

manifestly unwelcome and egregious conduct-intensive intrusion into, and disregard or disrespect for, the autonomy of the other person.

After many months of laborious work a decade and a half ago, the EEOC produced responsible and generally carefully calibrated guidelines to define broadly, and to prohibit effectively, unlawful sexual harassment in the workplace. The EEOC guidelines prohibiting sexual harassment were not uniformly well received by the federal courts. For much of the prior decade of the seventies, the lower federal courts were split over whether sexual harassment was a form of unlawful discrimination prohibited by the Title VII sex discrimination provision or, although reprehensible as a social and moral matter, not effectively sanctionable by Title VII. Fortunately, by 1986, the EEOC guidelines prohibiting sexual harassment came before the United States Supreme Court and, with Chief Justice Rehnquist writing for a unanimous Court in his first term as the Chief Justice, the EEOC guidelines prohibiting sexual harassment in the workplace were sustained as having the full force of Title VII law.[61]

Sexual harassment cannot be fully eradicated by legal sanction alone, but there is no doubt that federal civil rights law in the workplace has provided one powerful instrument with which to at least begin to address, and to remedy, this pathological social dysfunction. Likewise, the law alone will not put an end to religious harassment in the workplace. However, carefully recalibrated future EEOC guidelines designed to prohibit unlawful religious harassment in the secular workplace, while respecting RFRA and appreciating the legitimate distinctions between free exercise of religion expressly protected by the First Amendment and sexual activity without such a powerful express constitutional grounding, can likewise begin to make the secular workplace a more civil and perhaps an even more decent place.

IV. CONCLUSION

Unlike most of the authors in this symposium, I am not persuaded as to whether RFRA is unconstitutional. I am profoundly opposed to the pernicious *Smith* decision, and I hope that the Court will one day expressly repudiate it.

If RFRA is constitutional, the religious rights of the conven-

61. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

tional religious majorities may be most protected in the secular workplace; I doubt seriously whether the religious minorities not within the mainstream and socially orthodox religions will most effectively or most frequently assert RFRA protections. My practical concern is that those most in need of RFRA, the adherents of the socially peripheral, marginalized, and disfavored religions and sects, will be ground under in the secular workplace by their majoritarian religious co-workers; mainstream Christians will far outnumber the minority sect adherents in most secular workplaces.

The subordination of RFRA rights of the religious minorities to the religious majorities would be an ironic twist to RFRA. While this is a very real concern, I doubt that, on balance, the nation would be better off without RFRA. We, as a nation, would certainly be better off without the *Smith* decision. But, as a very practical matter, unless and until the Supreme Court is internally persuaded to reverse *Smith*, RFRA is a very important tool to situate and to protect religious freedoms. In the best of all worlds, there would be no need for RFRA, and the free exercise rights of all would fully flower, without the need of express constitutional declarations, and *Smith* decisions would be inconceivable. But, alas, this is not yet a perfect world, and RFRAs are necessary and practical legislative instruments designed to partially ameliorate the pernicious consequences of the *Smith* decision.

If RFRA is ultimately sustained by the Court, rejuvenated future EEOC guidelines, carefully recalibrated to respect RFRA and the First Amendment, could probably pass muster. If RFRA is struck down, future EEOC guidelines prohibiting unlawful religious harassment in the secular workplace can more readily be effectuated as a more immediate matter. However, the unconstitutionality of RFRA should not be cause for rejoicing within the EEOC or among any persons favoring the promulgation of the guidelines to prohibit religious harassment in the secular workplace. For, properly and fully understood, RFRA is not a bar or even an impediment to the EEOC guidelines; it is not even a hurdle. Rather, RFRA is a nobly-intended legislative construct, necessitated by the *Smith* decision, under which the administrative agency's guidelines should be carefully recalibrated and eventually effectuated.

For the moment, the EEOC proposed guidelines initiative has been legislatively suspended. But, in time, the EEOC initia-

tive should be carefully reinvigorated, thoughtfully tailored and effectively implemented.